

# Chapter 1

## Introduction

1.1 On 6 December 2017 the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the bill) was introduced by the government in the Senate.<sup>1</sup> On 7 December 2017 the Senate referred the bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 20 April 2018.<sup>2</sup> In referring the bill to the committee, the Selection of Bills Committee noted that:

...issues of concern to relevant stakeholders require opportunity for feedback [and that there is a] need to consider expert views on impacts and possible improvements<sup>3</sup>

### Background

#### *Government consultations*

##### *The foreign bribery offence*

1.2 Australia has been a committed party to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) since 1999. The Anti-Bribery Convention obliges State parties to criminalise the bribery of foreign public officials and implement a range of related measures to make this criminalisation effective.<sup>4</sup>

1.3 Australia has given effect to these obligations through the foreign bribery offence in section 70.2 of the *Criminal Code Act 1995* (Criminal Code), which carries significant penalties for individuals and companies.

1.4 Noting that the offence in its current form poses challenges for typical cases of foreign bribery, on 4 April 2017, the Minister for Justice, the Hon. Michael Keenan MP, released a public consultation paper on proposed reforms to Australia's foreign bribery regime.<sup>5</sup> These reforms included possible new offences of recklessly bribing a foreign public official and failure to prevent foreign bribery.

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1 *Journals of the Senate*, No. 78, 6 December 2017, p. 2484.

2 *Journals of the Senate*, No. 79, 7 December 2017, pp. 2512–2513.

3 Selection of Bills Committee, *Report No. 15 of 2017*, December 2017, Appendix 6.

4 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, Article 1.

5 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx> (accessed 11 January 2018).

1.5 Submissions to the foreign bribery consultation closed in May 2017 and the 16 submissions received are published.<sup>6</sup>

1.6 In the main, the bill implements the amendments proposed in the consultation.

*A deferred prosecution agreement scheme in Australia*

1.7 At the same time, another key focus of the government's consideration was the option of a deferred prosecution agreement (DPA) scheme, which aims to assist with enforcement of the foreign bribery offence, among other things.<sup>7</sup>

1.8 Under a DPA scheme, where a company engages in a serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement to comply with a range of specified conditions. The terms of the DPA would likely require the company to cooperate with any investigation, pay a financial penalty, admit to agreed facts, and implement a program to improve future compliance. A company would not be prosecuted in relation to the matters outlined in the DPA where the company fulfils its obligations under the agreement.

1.9 On 31 March 2017, Minister Keenan released a public consultation paper on a proposed model for a DPA scheme in Australia.<sup>8</sup>

1.10 Submissions to the DPA scheme consultation closed in May 2017 and the 18 submissions received are published.<sup>9</sup>

1.11 Notably, this consultation followed an initial discussion paper the government had released on the concept of DPAs in March 2016, which was endorsed by the majority of stakeholders.<sup>10</sup>

1.12 In the main, the bill implements the DPA model as outlined in the consultation.

***Senate Economics References Committee inquiry into foreign bribery***

1.13 On 24 June 2015, the Senate referred the matter of the measures governing the activities of Australian corporations, entities, organisations, individuals, government

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6 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, <https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx> (accessed 11 January 2018).

7 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx> (accessed 11 January 2018).

8 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx> (accessed 11 January 2018).

9 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx> (accessed 11 January 2018).

10 Attorney-General's Department, *Deferred prosecution agreements—public consultation*, 2016, <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> (accessed 4 January 2018).

and related parties with respect to foreign bribery, to the Economics References Committee for inquiry and report by 1 July 2016.<sup>11</sup> The inquiry lapsed following the double dissolution of the 44<sup>th</sup> Parliament but was re-referred in the 45<sup>th</sup> Parliament with the same terms of reference and a reporting date of 30 June 2017.<sup>12</sup> The committee was granted a number of extensions to report,<sup>13</sup> and on 28 March 2018 tabled its report—*Foreign bribery*.<sup>14</sup>

1.14 The terms of reference to the inquiry, included:

...the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including: (vii) measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements...<sup>15</sup>

1.15 Much of the evidence received by the Senate Economics References Committee as part of this inquiry in the 45<sup>th</sup> Parliament evaluated the above proposals to reform Australia's foreign bribery regime and for a DPA scheme.<sup>16</sup>

1.16 The majority of the recommendations made in the Senate Economics References Committee's *Foreign bribery* report support the reforms proposed in the bill.

### **Purpose of the bill**

1.17 The Explanatory Memorandum (EM) to the bill explains that the proposed measures address the challenges associated with detecting and addressing serious corporate crime in Australia. It states:

The opaque and sophisticated nature of serious corporate crime can make it difficult to identify and relatively easy to conceal. Investigations into corporate misconduct can be hampered by the need to process large amounts of complex data and conduct lengthy negotiations over claims of legal professional privilege. Evidence may be held overseas and therefore require investigators to engage with mutual assistance processes. Court

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11 *Journals of the Senate*, No. 101, 24 June 2015, pp. 2807–2808.

12 *Journals of the Senate*, No. 9, 11 October 2016, p. 173.

13 On 20 June 2017, the Senate granted the Economics References Committee an extension to report by 7 December 2017, *Journals of the Senate*, No. 46, 20 June 2017, p. 1494. On 27 November 2017, the Senate granted the Economics References Committee a further extension to report by 7 February 2018, *Journals of the Senate*, No. 72, 27 November 2017, p. 2283. On 5 February 2018, the Senate agreed for the Economics References Committee to report by 28 March 2018, *Journals of the Senate*, No. 80, 7 February 2018, p. 2565.

14 Senate Economics Reference Committee, *Foreign bribery*, March 2018.

15 *Journals of the Senate*, No. 101, 24 June 2015, p. 2807.

16 See Senate Economics References Committee, Inquiry into Foreign bribery, submissions received in the 45<sup>th</sup> Parliament; *Committee Hansard*, 7 August 2017; and 31 October 2017.

proceedings can be long and expensive, particularly against well-resourced corporate defendants.<sup>17</sup>

1.18 The EM notes that the proposed amendments to the foreign bribery offence are aimed at improving its effectiveness in addressing foreign bribery, and removing undue impediments to a successful prosecution. It observes:

The offence in its current form poses challenges for typical cases of foreign bribery, which may involve the use of third party agents or intermediaries, instances of wilful blindness by senior management to activities occurring within their companies and a lack of readily available written evidence.<sup>18</sup>

1.19 With respect to the introduction of a DPA scheme, the EM suggests that this initiative is aimed at enhancing the accountability of Australian business for serious corporate crime and supporting improved corporate culture. It states:

The DPA scheme is designed to address some of the challenges in detecting and addressing serious corporate crime by encouraging corporations to self-report misconduct by offering greater certainty of outcome when compared to litigation, and an opportunity to avoid some of the reputational and financial costs associated with lengthy criminal investigations and trial processes.<sup>19</sup>

## **Overview of the bill**

### ***Improving Australia's efficiency in addressing foreign bribery***

1.20 Schedule 1 of the bill seeks to amend the offence of bribery of a foreign public official in the Criminal Code to:

- extend the definition of foreign public official to include a candidate for office;
- remove the requirement that the foreign official must be influenced in the exercise of the official's duties;
- replace the requirement that a benefit and business advantage must be 'not legitimately due' with the concept of 'improperly influencing' a foreign public official; and
- extend the offence to cover bribery to obtain a personal advantage; and create a new offence of failure of a body corporate to prevent foreign bribery by an associate.

1.21 Schedule 1 of the bill also seeks to introduce a new offence into the Criminal Code of failure of a body corporate to prevent foreign bribery by an associate. Under the new offence, a body corporate would be liable where the associate committed the bribery for the profit or gain of the body corporate. However, the offence would not apply if the body corporate had in place adequate procedures

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17 EM, p. 1.

18 EM, p. 3.

19 EM, p. 3.

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designed to prevent the commission of the foreign bribery offence by its associates. The Attorney-General will publish guidance to assist corporates to develop adequate procedures to prevent foreign bribery.

1.22 In addition, schedule 1 of the bill makes consequential amendments to the *Income Tax Assessment Act 1997* to ensure the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to a foreign public official.

### ***Enhancing corporate accountability and encouraging self-reporting by companies***

1.23 Schedule 2 of the bill seeks to amend the *Director of Public Prosecutions Act 1983* (DPP Act) to implement a Commonwealth DPA scheme which will enable the Commonwealth Director of Public Prosecutions (CDPP) to invite a company (not an individual) that has engaged in serious corporate crime to negotiate an agreement to comply with a range of specified conditions. The offences of fraud, foreign bribery and money laundering could appropriately be the subject of DPA offers.<sup>20</sup>

1.24 Schedule 2 of the bill also makes consequential amendments to the tax law,<sup>21</sup> the *Administrative Decisions (Judicial Review) Act 1977* and the *Crimes Act 1914*.

### **Financial implications of the proposed measures**

1.25 The EM to the bill states that it is unlikely to have a significant financial impact. However, with reference to the proposed DPA scheme in schedule 2 of the bill, the EM notes that:

...parties to a DPA will typically be required to pay a financial penalty to the Commonwealth under the terms of that DPA. This may lead to the recovery of penalties in cases that might not have otherwise proceeded to prosecution. Where appropriate, a party to a DPA may also be required to compensate Commonwealth agencies for any costs associated with the negotiation and administration of a DPA. Otherwise, costs incurred by Commonwealth agencies as a result of the DPA process will be absorbed by these agencies.<sup>22</sup>

### **Legislative scrutiny**

1.26 The EM to the bill recognises that the measures in the bill engage the human rights to: freedom from arbitrary detention; a fair and public hearing; be presumed innocent; and privacy. However, the EM states that the bill is compatible with human rights and:

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20 Schedule 2, item 7 of the bill which seeks to insert new subsection 17B(1) into the DPP Act that provides a table which lists the offences to which a DPA may relate.

21 *A New Tax System (Goods and Services Tax) Act 1999* and *Income Tax Assessment Act 1997*.

22 EM, p. 4.

[t]o the extent that it may limit those rights, the limitations are reasonable, necessary and proportionate in light of the objective of strengthening agencies' ability to respond to serious corporate crime.<sup>23</sup>

1.27 The Parliamentary Joint Committee on Human Rights considered the bills in its *Report 1 of 2018* and made no comment.<sup>24</sup>

1.28 The bill was also considered by the Senate Standing Committee for the Scrutiny of Bills.<sup>25</sup> Specifically, the committee sought information from the Attorney-General regarding the appropriateness of:

- the reversal of the evidential burden of proof;<sup>26</sup> and
- including significant matters in non-statutory guidelines (that is, guidance on the steps that a body corporate can take to prevent an associate from bribing a foreign public official).<sup>27</sup>

### **Conduct of the inquiry**

1.29 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions by 7 February 2018. The committee received 8 submissions, which are listed at Appendix 1.

### **Structure of this report**

1.30 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, and discusses the evidence received in this inquiry, as well as submissions made in relation to the government's consultations on the amendments proposed in the bill.

### **Acknowledgements**

1.31 The committee thanks all individuals and organisations who assisted with this inquiry, especially those that made submissions.

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23 EM, p. 9.

24 Parliamentary Joint Committee on Human Rights, *Report 1 of 2018*, 13 February 2018, p. 78.

25 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, 7 February 2018 and *Scrutiny Digest 3 of 2018*, 21 March 2018.

26 Schedule 1, item 7 of the bill which seeks to insert a new subsection 70.3(2A) into the Criminal Code that would provide an additional offence-specific defence (rather than an element of the offence) to the foreign bribery offence in section 70.2.

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, 7 February 2018, pp. 17–20; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, 21 March 2018, pp. 93–100.